STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS L. WILSON, Plaintiff-Appellee,	UNPUBLISHED June 21, 2011
v	No. 301719 Tuscola Circuit Court
JAMI S. WILSON, Defendant-Appellant.	LC No. 09-025477-DM

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce, challenging the manner in which the trial court determined the awards of spousal support and child support, as well as its determinations related to their marital property and custody of their children. We affirm.

The parties were married for 15 years and had three children. At the time of trial, plaintiff was 38 years old and defendant was 34 years old. During the course of the marriage, they established two businesses. One business, Thumb Aggregate, made aggregate for road construction and concrete facilities. The second business, Doug Wilson Enterprises, held real properties and leased property to Thumb Aggregate. Plaintiff operated the businesses and worked full-time as a laborer at Thumb Aggregate, and defendant worked part-time at Thumb Aggregate performing aggregate testing, as well as office and bookkeeping duties. Thumb Aggregate provided each a salary, and also paid for various personal and household expenses. Plaintiff earned a net pay of $650 a week and defendant earned a net pay of $460 a week. However, defendant testified that the family budget was between about $100,000 and $150,000 a year, which plaintiff did not contest. Defendant also worked as a dental hygienist on occasion, earning between $28 and $30 an hour. The evidence revealed that the parties and their businesses acquired significant assets, as well as significant debts during the marriage. Plaintiff testified that, in light of the divorce as well as other factors, including the economy, declining business, the high costs of operating the aggregate business and its significant debt, the marital home should be sold and the businesses liquidated. Plaintiff indicated that he built Thumb Aggregate for his family as part of a long term plan and, with the divorce, that plan was over. He was considering work as an equipment operator earning between $13 and $15 an hour, or possibly getting back into the aggregate business in the future. Defendant testified that she became employed part-time at a retail store earning minimum wage, but was actively seeking full-time employment as a dental hygienist.

The parties agreed to an equal division of the marital estate. However, they disagreed on several issues, including primarily (1) whether the businesses should be liquidated, (2) the value of the businesses, (3) whether the marital home should be sold, (4) the amount of income to impute to each of them, (5) the amount of spousal support, (6) the amount of child support, and (7) the custody arrangement. At the conclusion of a five-day trial, the court held that the parties' expert appraisals of the businesses could not be reconciled and ordered the businesses liquidated. The court also ordered: (1) the marital home sold, (2) income imputed to plaintiff in the amount of $113,500 a year and to defendant in the amount of $25,000 a year, (3) spousal support in the amount of $1,392 for 44 months, (4) child support in the amount of $821 a month, and (5) a five week on-five week off bird-nesting custody arrangement. Defendant appealed. Thereafter, this Court denied defendant's motion to stay as to the sale of the marital residence, but granted the motion to stay as to the sale of the businesses and the business assets. *Wilson v Wilson*, unpublished order of the Court of Appeals, entered March 7, 2011 (Docket No. 301719).

First, defendant argues that the trial court erred in ordering the two businesses liquidated without first placing a value on those marital assets. We disagree. In a divorce action, this Court first reviews for clear error a trial court's findings of fact, and then considers whether its dispositional ruling was fair and equitable in light of those facts. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

Plaintiff presented evidence during the trial that (1) Thumb Aggregate had a fair market value of $774,387 and its total liabilities were $789,933, leaving negative equity in the amount of $15,546 and (2) Doug Wilson Enterprises had a fair market value of $840,917 and its total liabilities were $758,147, leaving positive equity in the amount of $82,770. Thus, the total equity in the businesses was $67,224. Defendant presented evidence during the trial that (1) Thumb Aggregate had a fair market value of $1,213,387 and its total liabilities were $689,933, leaving positive equity in the amount of $542,704 and (2) Doug Wilson Enterprises had a fair market value of $1,110,117 and its total liabilities were $758,147, leaving positive equity of $303,270. Thus, the total equity in the businesses was $845,974. Accordingly, the parties' valuations of the businesses differed by $778,750. In this regard, the court held: "The court has been presented with such disparate appraisals by the experts of the respective parties that it finds itself unable to reconcile those appraisals and make an accurate determination of the property values." The court then noted that plaintiff, who operated the businesses and provided much of the labor, wanted the businesses liquidated and the parties to share any profit or deficit equally. Accordingly, the court ordered the businesses liquidated.

Defendant takes issue with the trial court's holding and argues that:

> The trial court overlooks the fact that these ongoing businesses had annual income of more than one million dollars. [ ] Forcing a sale without taking into consideration the ongoing stream of income is totally unreasonable and not justified on the record. In fact, by the end of the trial, [plaintiff] was operating the businesses and continues to do so to the present time.

We are unclear what defendant is arguing here. It appears that defendant is arguing that plaintiff should be *forced* by the court to continue to operate and work for the businesses against his will. We know of no law that supports defendant's apparent contention and defendant has not cited to

any such law. Defendant testified that she did not want to keep and operate the businesses. Neither did plaintiff. Defendant has not directed us to any law that would permit the trial court to force either defendant or plaintiff to keep the businesses that neither wanted to keep. The fact that plaintiff continued to operate Thumb Aggregate during the pendency of this divorce and until the proceedings are finalized likely was for the purpose of preserving the significant assets that would otherwise be standing idle, deteriorating while the debt associated with a nonoperational business continued to accumulate. Accordingly, this argument is without merit.

Defendant also argues that the trial court was required to make specific findings of fact regarding the value of the businesses and cites to *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003) in support of the argument. However, that case and many others explain that the court is required to make specific findings of fact regarding the value of each disputed piece of marital property *that is awarded to each party in the judgment*. In *Olson*, the defendant owned 71.85 percent of a closely held corporation before he married the plaintiff. *Id*. at 621. Because the parties' experts' valuation of the corporation were significantly different, the trial court awarded the plaintiff in the judgment one-half of the defendant's stock in the corporation without placing a value on the defendant's interest in the stock. *Id*. at 623. This Court noted that, because "selling the corporation was not possible," the award was vacated and the trial court was directed to make a finding regarding the value of the stock and grant the plaintiff a cash award in an amount equal to one-half of that value. *Id*. at 627 n 5, 629. In the case before us, selling the businesses *was* possible and *neither* party was awarded the businesses in the judgment because neither party wanted the businesses—clearly distinguishable facts from those present in *Olson*.

In a similar case, *Steckley v Steckley*, 185 Mich App 19; 460 NW2d 255 (1990), the plaintiff had an interest in ten McDonald's restaurants which accrued during the marriage to the defendant. *Id*. at 20-21. After the trial court could not reach a valuation decision on that interest, the plaintiff was awarded his entire McDonald's interest to the exclusion of the defendant. *Id*. at 21-22. This Court held that, in order to attain an equitable distribution of the marital assets, the trial court was required to establish a fair value of that interest and award the defendant an equitable share of that value. *Id*. at 23-24. In the case before us, neither party was awarded the businesses at issue; rather, after liquidation they would each share equally in the profit or deficit associated with the sale of the businesses. Thus, again, the facts are clearly distinguishable from those of *Steckley*.

And, even if the trial court had placed a value on the businesses, such valuation would not have changed the outcome—neither plaintiff nor defendant wanted the businesses. Defendant's argument in her appeal brief that the valuation should have occurred and that plaintiff should then have been ordered to pay her "her half of the value" is unavailing. Plaintiff was not awarded the businesses and did not want the businesses. By the same token, the trial court could have ordered that defendant pay plaintiff his half of their value, although she did not want the businesses either. In summary, the trial court properly ordered the businesses liquidated and the profits or losses shared equally—that is an equitable distribution of these marital assets under the facts of this case.

Next, defendant argues that the trial court's findings with regard to plaintiff's and defendant's salaries were erroneous as unsupported by the evidence. We disagree. A finding of

fact is clearly erroneous if, after review of the entire record, this Court is left with the definite and firm conviction that a mistake was made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Special deference is given to the trial court's findings when they are based on the credibility of the witnesses. *Id*.

Here, plaintiff testified that he earned a net pay of $650 a week and defendant earned a net pay of $460 a week from Thumb Aggregate. In 2009, plaintiff's declared income was just under $40,000 and defendant's declared income was just over $27,000. Both plaintiff and defendant admitted that many personal and household expenses were paid directly by Thumb Aggregate and defendant testified, uncontested, that the family budget was between about $100,000 and $150,000 a year. Defendant also testified that, when she worked as a dental hygienist, she earned between $28 and $30 an hour. However, at the time of trial she had a part-time retail job earning minimum wage.

In plaintiff's closing argument brief, he argued that his imputed income should be $113,400 a year—"a reasonable average which would include both [his] and [defendant's] W-2 income and the personal expenses paid to the family in the past." Plaintiff also argued that defendant's imputed income should be $35,250 a year—an average derived "from roughly $55,000 she could make full-time as a dental hygienist and $15,500 approximately at full-time minimum wage." In defendant's closing argument brief, she argued that the two businesses produced, on average over the previous three years, $250,000 in income a year. Defendant argued: "[A]fter paying all the debt and other necessary expenses (of the businesses), the parties had on average $250,000 a year in discretionary cash to do with what they wanted." Defendant argued, without any explanation, that plaintiff's income—rather than defendant's income—should be imputed the purported $250,000 in discretionary cash. But, as defendant admitted, the *parties* both had this purported discretionary cash "to do with what *they* wanted." Even in her appeal brief, defendant fails to explain why, even if this "discretionary cash" existed, it should all be imputed to plaintiff as *his* income.

In any case, contrary to defendant's claim on appeal, the trial court did not pick the incomes "out of thin air." Both parties agreed that the family budget was much more than their stated incomes—it was between $100,000 and $150,000 a year. The trial court apportioned a majority of that expense to plaintiff by imputing income of $113,500 a year to him, although his declared income was about $40,000 a year. After review of the entire record, we are not left with the definite and firm conviction that a mistake was made. See *Draggoo*, 223 Mich App at 429.

In her brief on appeal, defendant argues that "[t]here is absolutely nothing in the record to support" the trial court's decision to impute her income of $25,000 a year. We disagree. A trial court's decision to impute income is reviewed for an abuse of discretion. *Stallworth v Stallworth*, 275 Mich App 282, 286-287; 738 NW2d 264 (2007). Underlying findings of fact are reviewed for clear error. *Draggo*, 223 Mich App at 429.

Defendant testified that she worked part-time in retail earning minimum wage which was said to be $7.40 an hour. She also testified that when she worked as a substitute dental hygienist she earned between $28 and $30 an hour. Although she testified that she was seeking full-time employment as a dental hygienist but was unable to secure a job, the trial court specifically

found that her lack of full-time employment was "due at least in part to a lack of diligence on her part in seeking full time employment." The court continued that it appeared that "defendant would prefer that even after the divorce plaintiff should continue to support her and the children in the lavish style to which she has become accustomed without the necessity of her working full time." Special deference is given to the trial court's findings when they are based on the credibility of the witnesses. *Draggoo*, 223 Mich App at 429. And this finding is supported by the record evidence. Despite the pendency of the divorce, which proceedings began in June of 2009 and ended in judgment in October of 2010, defendant did not secure *any* full-time employment, even in retail earning minimum wage. Further, according to the record, defendant also had earned income as an interior decorator during the marriage. Her earning capacity as a full-time employee was between about $15,000 a year—if she earned minimum wage—and over $50,000 a year if she worked as a dental hygienist. The court imputed an annual income of $25,000 to defendant. Voluntary unexercised earning power may be considered for purposes of imputing income. *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987). Accordingly, the trial court's decision is affirmed.

Next, defendant argues that her award of spousal support was inequitable and premised on the clearly erroneous findings regarding the parties' imputed income. We disagree. A trial court's award of spousal support is reviewed for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id*. The trial court's findings of fact relating to an award of spousal support are reviewed for clear error. *Id*. "The trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable." *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003).

First, we note that this issue was not set forth in defendant's statement of questions involved in violation of MCR 7.212(C)(5). Ordinarily, an issue not contained in the statement of questions presented is deemed waived or abandoned on appeal. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Nonetheless, we will address the issue.

Second, as discussed above, the trial court's decisions regarding the parties' imputed incomes is affirmed. Accordingly, defendant's argument on appeal that the award of spousal support should have been based on an imputed income to plaintiff in the amount of $250,000 is without merit.

Third, the objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances of the case. *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). In rendering its spousal support decision, the trial court indicated that it had reviewed the factors set forth in the applicable law, "including the past relations and conduct of the parties, the length of the marriage, ability of the parties to work, the source and amount of property awarded to the parties, the age of the parties, the ability of the parties to pay spousal support, the present situation of the parties, the needs of the parties, the health of the parties, the prior standard of living of the parties and whether either is responsible for the support of others, and general principles of equity." The court then awarded defendant spousal support in the

amount of $1,392 a month for 44 months, which was modifiable. Considering the facts of this case, this award is just and reasonable. See *Berger*, 277 Mich App at 726.

The parties were married for 15 years and defendant was 34 years old, in good health, college educated, and a dental hygienist with a fairly significant earning capacity of up to $50,000 a year. Plaintiff was 38 years old, in good health, and did not graduate from high school. The court ordered that the marital home and the businesses were to be sold. According to defendant, the businesses had net equities totaling $845,974. Defendant was awarded half of any such net proceeds. Although defendant admitted that she "did live a very comfortable lifestyle" before the divorce, so did plaintiff. And as a consequence of the divorce, it appears that plaintiff's lifestyle will also be drastically different. Plaintiff testified that after the businesses were sold, he would likely work as an equipment operator earning between $13 and $15 an hour—about $30,000 a year. However, if the financial positions of the parties change, the spousal support award is modifiable according to the judgment of divorce. Because we are not firmly convinced that the trial court's decision on spousal support was inequitable, we affirm the decision. See *Gates*, 256 Mich App at 433.

Next, defendant argues that her award of child support was inequitable because it was improperly based on erroneous determinations of income and was not based on the child support guidelines. We disagree. Child support orders are reviewed for an abuse of discretion, *Holmes v Holmes*, 281 Mich App 575, 586; 760 NW2d 300 (2008), but we review de novo whether the trial court acted properly within the child support guidelines. *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007).

First, for the reasons discussed above, the incomes imputed to the parties were properly assigned. Second, it appears that defendant is claiming either that the child support formula was not used or that the amount of child support awarded was improperly calculated according to the child support formula. However, after the trial court imputed the parties' incomes, it held as follows: "On the basis of said imputations, and on the basis of shared equal custody provisions ordered by the court, according to the Michigan Child Support formula guidelines, plaintiff should be required to pay to defendant $821.00 per month . . . ." Thus, contrary to defendant's claim, the trial court expressly indicated that it did follow the formula. And defendant has failed to set forth any evidence that the award was improperly calculated under that formula. That is, defendant merely argues in her brief on appeal that the trial court should have imputed an income of $250,000 to plaintiff when it applied the formula. Defendant does not argue that using the imputed income figures the court determined accurate still resulted in an improper calculation of child support. Thus, this issue is without merit.

Next, defendant argues that the trial court erred in dividing the personal property of the parties without making any factual determinations as to the values of the individual items. We disagree. The personal property award was very limited. First, plaintiff was awarded his truck, and its debt, and defendant was awarded her vehicle, and its debt, as well as a paid-off Ford Explorer. Defendant was awarded her IRA and a kitchen island. Plaintiff was awarded the household furniture at a cost of $15,000, which defendant was to be paid—consistent with her valuation of the property. Family photographs were to be divided equally, and household hand tools, dishes, housewares, and bedding were also divided equally. Defendant was awarded a certain desk and the sun room furniture, as well as some of the appliances and electronics in the

home. Plaintiff was awarded his snowmobile, and the snowmobiles of the children, while defendant was awarded the two children's motorcycles. Plaintiff was awarded the furniture from the rental property and cabin.

Defendant is correct that the trial court did not assign values to this personal property, other than the $15,000 household furniture. However, the goal in distributing marital assets is to reach an equitable distribution in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). Here, there is little doubt that the division was fair and equitable. The majority of the items were divided equally, with the exception of a few remainder items—particularly the snowmobiles and the motorcycles, but each party received one set of those items. On appeal defendant does not set forth any facts in support of her claim of an inequitable division of property. And defendant failed to set forth any references in the trial transcripts where she offered evidence as to the particular values of the personal property at issue. Under the facts of this case, we affirm the trial court's award of the personal property.

Finally, defendant argues that the trial court erred in determining that the five week alternating "bird-nesting" custody schedule was in the best interests of the children. We disagree. It appears that defendant is arguing that the "bird-nesting" arrangement was not in the best interests of the children because it "requires three places of residence, one for the children, and each of the parents." Defendant also argues that: "Where [defendant] has had very limited money and [plaintiff] has had a lot of money, he has been able to "favor" the children with all kinds of "rewards" while [defendant] has not been able to do that. Further, [plaintiff] (like many husbands) is not a natural "house keeper" so, when [defendant] enters the [sic] home during her nesting period, she also ends up being responsible for all of the upkeep." However, these "arguments" have no bearing on the issue whether bird-nesting is in the best interests of the children.

After reviewing the best interest factors, the trial court held that each parent should have equal custody of the children. To implement that arrangement, the court ordered that each parent have primary domicile with the children on a five week alternating basis. Until the marital home was sold, the court concluded that the children should remain in the home during that rotating schedule, with each parent moving in and out as scheduled. The home has since been sold; therefore, defendant's complaints about the bird-nesting arrangement are moot.

Affirmed. This Court's stay as to the sale of the businesses and the business assets is vacated.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto